THE NEWFOUNDLAND FISHERY DISPUTE

BY P. T. MC GRATH.

No more vexatious international entanglement could well be imagined than the present fishery dispute between Newfoundland and the United States. While, superficially, it appears to be a mere question of whether the Colonial Government can hamper American fishermen in procuring cargoes of herring on the West Coast of the Island, it really comprehends the genesis of the dispute between the Republic and Canada respecting the whole Atlantic Fisheries, which has proved so difficult of solution during the past fifty years. A close study of the subject shows it to be fraught with serious problems and complicated offshoots, and to bristle with issues demanding the subtlest reasoning and most cautious presentments by jurists and statesmen.

The pending deadlock has its direct and serious bearing for Canada as well as for Newfoundland, because in the negotiations between Britain and America any basis of interpretation which may be reached respecting hitherto unsettled points as to the phraseology and bearing of the Treaty of 1818, must apply to those portions of Canada's seaboard where the American fishermen have treaty rights such as they possess on part of the Newfoundland coast; and, therefore, Canada will assuredly be called into conference, as well as Newfoundland, so as to make the conclusions final and absolute.

To a clear understanding of the merits of the present entanglement, a brief review of the history of this fishery dispute will be helpful. The American Colonists had common fishing rights in the waters of Canada and Newfoundland till the war of 1776. These were continued by the Treaty of 1783, but abrogated by the war of 1812. In 1818, the United States accepted rights on certain coasts, detailed below, and renounced them elsewhere.

From 1854 to 1866, the Reciprocity Treaty ruled, when the fish of either country had free entry into the other. From 1871 to 1886, the Washington Treaty allowed certain inshore fishing concessions to America in northern waters in return for a payment of $5,500,000. In 1887, a new fisheries treaty was negotiated, but rejected by the United States Senate. In 1888, a *modus vivendi* was concluded, giving American fishermen inshore privileges in the non-treaty waters of Canada and Newfoundland on paying a license fee of $1.50 per ship-ton. In 1890, Newfoundland and the United States framed the Bond-Blaine Convention for fisheries reciprocity, which Canada's protest to the British Government prevented being ratified. In 1895, and again in 1898, Canada sought reciprocity herself, but without effect. In 1902, she withdrew her objection to the Newfoundland Convention, and the Bond-Hay Treaty was arranged, which the United States Senate early in 1905 "amended to death," so that Newfoundland at once abrogated the *modus vivendi,* excluded the American fishermen from her non-treaty waters, and restricted them solely to their treaty rights in the areas where they possessed these.

The present difficulty between Newfoundland and the United States arises out of the Treaty of 1818. By that agreement the Republic obtained liberty for its inhabitants to take fish of every description forever in common with British subjects on the south coast of Newfoundland, from Ramea Islands westward to Cape Ray; on the west coast, from Cape Ray to Quirpon Islands; on the coast of Labrador, from Mount Joly, opposite Anticosti, eastward through Belle Isle Straits, thence northward indefinitely; and on the shores of the Magdalen Islands; with the supplementary right to land and dry their fish on the unsettled portions of Labrador and on the south coast of Newfoundland, but only while such seaboards continued unsettled. To all the rest of the British-American littoral the American fishermen were denied access, save for wood, water, shelter and repairs; and "for no other purpose whatever" might they enter.

It thus follows that, in the prosecution of their deep-sea fisheries, the Americans have no inshore waters wherein they may obtain bait or food-fishes, save those of the south and west coasts of Newfoundland and the Atlantic seaboard of Labrador, which is an appanage of Newfoundland; and in the Magdalen Islands

and the Laurentian frontal of Labrador, both of which belong to Canada. The right would appear to be amply clear, but there is nothing so uncertain as the meaning that may be given to treaty clauses. Thus, under the first reciprocity compact, lobsters were admitted duty free, but the cans containing them were levied upon; and it was proposed, later, to stop locomotives and cars at the American border, though the freight they bore had the right of free entry. These fishery disputes have been prolific of more friction between America, Britain, Canada and Newfoundland the past ninety years than any other disagreements.

The first issue which arises in respect to the Treaty of 1818 is what was meant by the word "coast" itself, for in the Peace Treaty of 1783 the people of the United States, while granted fishing rights on the Newfoundland coast, were forbidden to dry their catch on the "harbors, bays and creeks," so it was clear that some distinction was even then drawn between "coasts" and the bays and creeks, or indentations thereof. In the Treaty of 1818, this phraseology was repeated, and fishing rights were granted Americans on the "coast" of Newfoundland, on the "shores" of the Magdalen Islands, and on the "coasts, bays, harbors and creeks" of Labrador, while they were interdicted from three marine miles of any of the other "coasts, bays, harbors and creeks" of British North America, save to enter such "bays or harbors" when in distress. Before the Halifax Fisheries Commission, the Arbitration Tribunal which in 1877 fixed the sum to be paid by the United States for fishing concessions under the Washington Treaty of 1871, the question as to the distinction between "coasts" and the inlets thereof was exhaustively argued; but no attempt was ever made to give it practical effect until Premier Bond, in April, 1905, in introducing his retaliatory enactment against the American fishermen, because of the Senate's emasculation of the Bond-Hay Treaty, advanced the argument that the Americans, while entitled to fish along the west coast of Newfoundland, had no right to operate in the Bay of Islands or other inlets there. This bay is the principal seat of the winter herring fishery; and the effect of such a position, if upheld by the British Cabinet, the treaty-making and treaty-enforcing power, would be to deprive the New England fishermen of one of their most lucrative undertakings. The British Cabinet, however, declined to acquiesce in this construction

meanwhile, and the American fishermen are exercising this liberty now till a complete settlement is arranged.

In the prosecution of this fishery, though, the Americans could be prevented from obtaining the local aid which they had enjoyed formerly, and this course the Colony decided on. They could take fish themselves, it is true, but they could not buy fish, hire men, nor purchase necessities—and this prohibition was rigidly enforced. Thereupon, the United States vessels proceeded outside the three-mile limit, after arranging with local fisherfolk to follow them there. These fisherfolk, being beyond the Colonial jurisdiction, hired on board these vessels and returned into Colonial waters to catch herring for them, as members of their crews. This proceeding raised two distinct issues—first, Were American vessels which operated under a register fishing-craft? and, second, Were men so hired "inhabitants of the United States," to whom alone were the Treaty rights conceded? Respecting the first of these points, it is well to note that American fishing-vessels generally operate under a "fishing enrolment," whereas "merchantmen" carry a register. Many of the vessels engaged in the herring fishery use the latter certificate, and therefore are regarded as traders, not fishermen; and the right of traders to engage in fishing, the Newfoundland authorities questioned. The vessels affected appealed to Washington, and the State Department declared that a register embraced a "fishing enrolment" within it, and that such vessels could not be denied the right to fish.

Yet it is a curious fact that, in a despatch from Secretary Bayard to Ambassador Sackville-West on October 27th, 1886, the former asks "authoritative information of the Canadian laws regulating the sale and exportation of fresh herring from Grand Manan . . . a trade which has been carried on almost exclusively in American vessels for many years . . . for, although the vessels employed in this trade are duly registered in their home ports as fishing-vessels, yet, so far as the proposed trade is concerned, they are not manned or equipped nor in any manner prepared for taking fish, but their use is confined to the conveyance of fish as merchandise to ports in the United States, a commercial transaction *pur et simple*"; and the owners of these vessels wished to know if they could continue this trade after the abrogation of the Washington Treaty. Canada's reply was unfavorable, and as the above was virtually the status of the Amer-

ican vessels frequenting Newfoundlond waters until last year, they *buying* and not taking the fish, Newfoundland claimed authority to treat them similarly.

Secretary Root to-day maintains that such vessels must be regarded as legitimate fishing-craft, and Newfoundland admits the claim pending a final adjustment of the whole subject; but the course taken by Mr. Root has precipitated an entirely unexpected result in Maritime Canada, where these vessels frequently resort to hire men and procure supplies on their way to and from Newfoundland, which they could do without charge as "traders," but which as "fishers" renders them liable to the license fee of about $150 per craft, under the terms of the *modus vivendi,* by which alone American fishing-craft can obtain access to Canadian non-treaty waters. This is an unpalatable decision for the owners of these craft, but there is no alternative for them, save to risk being prevented from operating in Newfoundland waters.

Against the hiring of its people outside the three-mile limit in the manner practised, the Newfoundland Government has protested, as being against the letter and spirit of the Treaty of 1818, which cedes these fishing liberties to "inhabitants of the United States," whereas the effect of this invasion is that five-sixths of each crew are Newfoundlanders. This protest was based on the notable stand made by Ambassador Phelps during another phase of this fishery dispute in 1886, when, in his despatch to Lord Iddesleigh on the subject of the seizure of American vessels by Canadian cruisers, he declared:

> "If the British Courts should, nevertheless, find such authority in any existing Statute, the question, whether the Statute itself, or the construction given it, is warranted by the Treaty, would still remain; and also the still higher question whether, *if the strict technical reading of the Treaty might be thought to warrant such a result, it is one which ought to be enforced between sovereign and friendly nations, acting in the spirit of the Treaty.*"

Contending, then, that an interpretation of the Treaty which would prevent American shipmasters from enticing her men outside the territorial waters in small boats, at great risk to their lives, to "sign on" to these craft as part of their crews, would be but following the lines of Ambassador Phelps's despatch, Newfoundland has laid her case before the Mother Country.

The United States Cabinet having secured recognition for all classes of shipping, and the right for such to fish even in the harbors, bays and creeks, Newfoundland still claimed authority to board and overhaul them, and compel them to enter at the custom-houses, pay light dues and obey local revenue laws, and thus prevent smuggling and other lawlessness, or the invasion of the waters by vessels of other nationalities masquerading as Americans. This claim was likewise resisted by Secretary Root, who is represented by the Gloucester shipowners as having supplied them with the following memorandum to be forwarded to their vessels in those waters, as defining their rights therein:

"Vessels of American registry have the right to fish at any point, bay, harbor or inlet of the Treaty Coast of Newfoundland, with or without entering at Newfoundland custom-houses, for any kind of fish in any manner they think best, provided owner and master and mate are Americans, irrespective of nationality of crews or locality where crews are shipped, except Newfoundland crews shipped in Newfoundland territorial waters within the three-mile limit. If Newfoundland has any local law, which I do not think is the case, forbidding her citizens to ship in foreign ports or upon the high seas for the purpose of fishing in her own waters your rights may not be so clear, so far as Newfoundlanders are concerned."

In answer to this epitome of alleged American rights, Newfoundland has forwarded to the British Government a long and important communication, dealing with these several aspects of the question, and setting out, particularly, the manner in which Canada has been enforcing her interpretation of the Treaty on the Magdalen Islands and Laurentian Labrador, for over half a century, virtually on the lines which Newfoundland now contends for. The force of this answer lies in the fact that never before has there been any disagreement between the Newfoundland and United States Governments in regard to the Treaty, because Newfoundland has always been friendly with the New England fishermen heretofore, whereas Canada has invariably enforced the Convention in the most drastic and unfriendly fashion, and yet the Imperial Cabinet has nearly always upheld the Canadians in their views of that instrument.

All of these points, however, have been reserved for the two Cabinets to negotiate over, with a view to a satisfactory and final settlement, if possible. The matter of the liability of the American fishermen to the local fishery regulations is not new, for it

figured prominently in a famous fishery problem, the Fortune Bay Dispute. That was an outgrowth of the Washington Treaty of 1871, by which American fishermen acquired the right of free access and common usage of all the other Canadian and Newfoundland seaboards for twelve years, and under cover of which certain American vessels entered Fortune Bay, and on Sunday, January 6th, proceeded to take herring with purse-seines, in violation of three local ordinances prohibiting (1) all fishing on Sunday; (2) the "barring" or enclosing of fish in such seines; and (3) the seining of herring in the close season, between October and April. The coast folk forcibly intervened to prevent such violation of their laws, and compelled the Americans to desist, destroying one seine. The vessels affected put in bills for $105,000 damages; and, after three years of diplomatic correspondence, England paid $75,000 in full settlement, with the result that, as millions of dollars of the "Alabama" award are said to be still in the United States Treasury, nearly $20,000 of this amount remained unpaid after all claims had been proved.

England, however, in paying this amount, was careful to emphasize that she did so to satisfy the demands for redress for mob law; and she never receded from the position that she (or her colonies) possessed the sole right to prescribe the methods of administering and preserving these fisheries. This contention was supported by a circular issued by Secretary Marcy, at Washington, in 1856, in which he declared that:

"It is understood that there are certain Acts of the British North American Colonial Legislatures, and also perhaps executive regulations, intended to prevent the wanton destruction of the fishes which frequent the coasts of the colonies, and injuries to the fisheries thereon. It is deemed reasonable that both the British fishermen and the United States should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on those coasts. Such being the object of these laws and regulations, the observance of them is enforced upon the citizens of the United States in the like manner as they are observed by British subjects."

With respect to the Colonial claim of authority to search American fishing-vessels and compel them to report at the custom-houses, the demand for light dues is not an assertion of sovereignty, but an insistence that American fishermen using these Newfoundland ports should contribute to the coast aids provided, a position which every maritime country exacts for her-

self, and agrees to in her neighbors. The acquiescence of the American fishermen in these local laws is also a claim which Newfoundland considers herself justified in, because from the manner in which these American fishing-vessels now interpret Secretary Root's message, murder might be done on board them and they defy the Colonial officers to arrest the offenders. This is not an extreme position to take. Two years ago the master of a New England fishing-vessel shot and killed one of his crew in a Newfoundland port, and the right of the Colonial authorities to try the case was questioned in certain quarters.

It must be obvious, then, that the quoted declaration of Secretary Root, which is amplified in a despatch forwarded to Lord Lansdowne, in October, 1905, is one to which grave objection may reasonably be taken by the other party to the case, and contains propositions which, in the form laid down by him, the British Government cannot assent to, save by the sacrifice of all the principles which it has upheld in respect of this question for the past fifty years. It is true that most of the friction which arose came from evasions or breaches of the subsequent accords, and not of the original treaty, because, except for the advantage of exploiting the West Coast herring fishery, the Treaty shore of Newfoundland is now almost valueless to the Americans, being too remote from the Grand Banks to make a feasible baiting region, and too depleted by the local trawlers to serve as a satisfactory fishing-ground. But there exist sufficient precedents, in one form or another, to cover every phase of the problem which has become acute now, and to warrant Britain, Canada and Newfoundland in maintaining the views which they have placed on record in the past.

Another point which has long clamored for adjustment, and which this controversy has revived, is that respecting the extent of territorial jurisdiction seaward. In the recent trouble at Bay of Islands, the United States Fish Commission's schooner "Grampus," with an expert from that Department on board, Mr. Alexander, was stationed at the scene to watch the interests of American fishermen. The "Grampus," on each occasion when a United States "herringer" intended to go outside to ship men, preceded her and took up a position sufficiently far out to be beyond Colonial waters, and the fishing-vessel, sailing slightly farther out, received the men on board and so avoided any dis-

pute in which the United States Government would not support her. In all the fishing problems affecting Canada and Newfoundland, however, the three-mile limit has been a most irritating one. The same problem has affected all maritime boundary disputes, notably that respecting Alaska, recently settled. Generally speaking, the United States maintains that the three-mile limit should follow the sinuosities of the coast, whereas Great Britain contends for the "headland" theory, claiming all bays to be local waters and jurisdiction to extend three miles beyond an imaginary line drawn from the outer promontories. These antagonistic attitudes have been compromised in draft treaties arranged in 1866 and 1886, but never ratified by the United States Senate, though based upon the modern practice of European nations, that bays less than ten miles in width are regarded as territorial waters, while in larger bays jurisdiction is held to extend to the point where they are ten miles wide, the three-mile strip along the shore outward from there being also recognized. This problem is not so pertinent to the herring fishery on the west coast, where the bays are narrow and islands crop up so as to enable the three-mile limit to be strictly followed, but it applies more particularly to the larger bays, such as Fortune, Placentia, Conception, Trinity and Bonavista on the south and east coasts. In territorial waters to which the American fishermen have no right of entry under the Treaty of 1818, they were allowed access to purchase bait and supplies under the *modus vivendi* of 1888; but, in the spring of 1905, the Newfoundland Legislature cancelled this makeshift so far as her seaboard is concerned, though Canada still retains it in force. This policy Newfoundland's action is likely to induce her to terminate in the near future, as it is now apparent to the statesmen of both countries that there is no hope of obtaining reciprocity from the United States, and that they may really do better if they show a united front against American fishery aggression.

One of the American fisherman's grievances which Secretary Root lays the strongest stress upon is that the Newfoundland "Foreign Fishing Vessels Act," the statute directed especially against United States vessels, gives authority to Colonial officers to seize and bring into port, even on the Treaty Coast, any craft of the nationality and character of which they may be doubtful, and Mr. Root protests against it, emphasizing the fact that it

may lay American fishing-vessels open to serious interference in the conduct of their legitimate operations there. But the Colonial authorities, in their answer, point out that similar legislation has been enacted and ratified by the Imperial Government for enforcing this treaty since 1819, and by Canada in various measures since 1866, while it is also contended that such a regulation is necessary, in order to preserve order and regulate the fishing, treaty or no treaty.

Thirty years ago, after the Fortune Bay affair, Secretary Evarts expressed himself as of the opinion that "if there are to be regulations of a common enjoyment, they must be authenticated by a common or joint authority," and "such competent authority can only be found in a joint convention, that shall receive the approval of Her Majesty's Government and of our own." Lord Salisbury, on the other hand, contended for the absolute right of Great Britain, through her colonies, to impose upon foreign fishermen all restrictions which she in good faith imposed upon her own subjects. Secretary Blaine, when he took office, proposed to send American war-ships to Newfoundland to protect the fishery rights of his countrymen, and then advocated a joint naval fishery patrol, but nothing was done and the friction gradually ceased. In the present instance, it is not known with any degree of accuracy what the United States is contending for, or what the British Cabinet is upholding; but it is to be hoped that a compromise may be reached which will dispose of this difficulty in a way satisfactory to both sides, and thus avoid any rift in the present amicable relations between the British Empire and the American Republic.*

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* On October 5th, 1906, a *modus vivendi* was concluded between the British and American Governments to regulate the herring fishery for the season from October 15th, 1906, to January 15th, 1907, whereby, to admit of further negotiations for a permanent treaty, the American fishermen were allowed to use purse-seines in Colonial waters and to ship Colonial fishermen outside the three-mile limit, but were required to abstain from fishing on Sundays and obliged to pay light dues and to report at the custom-houses when ice would not prevent, all Newfoundland's laws which might abridge these liberties being held inoperative by the British Ministry. The arrangement evoked a storm of protest from the Colony, and drastic measures were threatened at the opening of the Colonial Legislature in January, 1907.—P. T. McG.